JONATHAN DAVID FRANK SBN89384
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Attorney for Material Witnesses

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Hon. CATHY ANN BENCIVENGO

UNITED STATES OF AMERICA, Plaintiff, v. GASTELUM, Defendants.	Case No. 08CR2032JLS Mag. No. 08MJ8526 NOTICE OF HEARING ON MOTION FOR VIDEOTAPE DEPOSITIONAND SUBSEQUENT VOLUNTARY DEPARTURE OF MATERIAL WITNESS DATE: July 17, 2008 TIME: 2:30 P. M. DEPT: BENCIVENGO

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on June 26, 2008 at the UNITED STATES DISTRICT COURT located at 940 Front Street, San Diego, CA 92101 before the above-named Judge at 2:30 P. M. or as soon thereafter as the matter may be heard, the material witness JORGE ORTIZ-GONZALEZ will move the Court for an Order that they be subjected to a videotape deposition prior to trial and subsequent voluntary departure.

This motion will be based on 18 U.S.C. 3144 in that the witnesses' testimony can be adequately secured by deposition and further detention is not necessary to prevent a failure of justice.

This motion is further based on this notice of motion, the memorandum of points and authorities and declarations filed herewith, and as such other and further evidence as may be presented at the hearing of the motion.

Respectfully submitted,

DATED: July 2, 2008

/s/________________________________
JONATHAN DAVID FRANK,
Attorney for Material Witnesses

JONATHAN DAVID FRANK
160 Thorn Street Suite 2
San Diego, CA 92103
(858) 722-2100
State Bar Number 89384

Attorney for Material Witnesses

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Hon. CATHY ANN BENCIVENGO

UNITED STATES OF AMERICA, Plaintiff, v. GASTELUM, Defendants.	Case No. 08CR2032JLS Mag. No. 08MJ85265 DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR VIDEO DEPOSITION OF MATERIAL WITNESS DATE: 7/17/08, 2008 TIME: 2:30 P. M. DEPT: BENCIVENGO

I, JONATHAN DAVID FRANK declare:

I am an attorney duly licensed to practice before all the courts of this State and this District and Circuit. I am the attorney of record for the material witnesses in the above action. I have personal knowledge of the facts set forth in this action and could testify competently thereto if called.

My client, JORGE ORTIZ-GONZALEZ, in this action, has been in federal custody since June 5, 2008. He has been held as a material witness in the above captioned case. My client has been unable to locate a surety to post bond.

This case was indicted on or about June 18, 2008.

My client has indicated to me that each day they spend in custody is a hardship to my client and his family as he is unable to help to support his family as set forth in his declaration filed concurrently herewith.

The testimony of the witness could be secured via videotaped deposition. This is a procedure in routine practice in this district in material witness cases. At such a deposition, all parties would be given the opportunity to fully and completely examine the witness. In addition, the proceedings would be videotaped creating a visual and auditory record of the proceeding. Such videotaped deposition could be introduced at trial in stead of the live testimony of the material witness.

Further, there are three other material witnesses represented by James Alvord.

Based on the above it respectfully requested that this motion be granted, that said deposition take place at the earliest possible time, and that my client be allowed to voluntarily return to his home in Mexico immediately thereafter.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge except as to those matters stated to be based upon information and belief and, as to those matters, I am informed and believe that they are true and correct. Executed this July 2, 2008 in Poway, California.

/s/____________________________
JONATHAN DAVID FRANK,
Attorney for Material Witnesses

JONATHAN DAVID FRANK SBN89384
160 Thorn Street Suite 2
San Diego, CA 92103
(858) 722-2100

Attorney for Material Witnesses

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Hon. CATHY ANN BENCIVENGO

UNITED STATES OF AMERICA, Plaintiff, v. GASTELUM, Defendant.	Case No. 08CR2032JLS Mag. No. 08MJ8526 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VIDEOTAPE DEPOSITION AND SUBSEQUENT VOLUNTARY DEPARTURE OF MATERIAL WITNESS DATE: July 172008 TIME: 2:30 P. M. DEPT: Bencivengo

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BY STATUTE AND CASE LAW,

THE MOTION SHOULD BE GRANTED

According to 18 U.S.C. 3144, "no material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition and if further detention is not necessary to prevent a failure of justice".

Furthermore, Fed. R. Crim. P. 15(a) specifies that a material witness may make a motion requesting such a deposition and the district court has the authority to order the taking of the deposition and thereafter to discharge the detained witness from custody.

As the Fifth Circuit stated in Aguilar-Ayala v. Ruiz, 973 F.2d 411 (1992) at page 413:

> Read together, Rule 15(a) and section 3144 provide a detained witness with a mechanism for securing his own release. He must file a "written motion", Fed. R. Crim. P. 15(a), requesting that he be deposed. The motion must demonstrate that his "testimony can adequately be secured by deposition" and that "further detention is not necessary to prevent a failure of justice" 18 U.S.C. section 3144. Upon such showing, the district court must order his deposition and prompt release. Id. ("No material witness may be detained" if he makes such a showing). Although Rule 15(a) is couched in the permissive "May" not the mandatory "shall", Fed. R. Crim. P. 15(a) ("the court...may direct that the witness' deposition be taken"), it is clear from a conjunctive reading with section 3144 that the discretion to deny the motion is limited to those instances in which the deposition would not serve as an adequate substitute for the witness' live testimony: that a "failure of justice" would ensue were the witness released...**absent a "failure of justice", the witness must be released.**

This is also the law in the Ninth Circuit as demonstrated by the very recent case of Torres-Ruiz v. United States District Court for the Southern District of California, 120 F3d 933 (9th Cir 1997). The court "agreed with the reasoning of [Aguilar-Ayala, supra]" and reversed Judge Huff who had denied a motion for a deposition on facts virtually identical to the instant action . As the court stated:

> In the instant case, two young men ages 19 and 22, have apparently been randomly selected out of a group of 27 undocumented aliens and detained for a period of over 60 days as material witnesses in a straightforward and uncomplicated alien smuggling prosecution. These young men state without opposition by either party to this case that they are the sole support for their respective families in Mexico, and that every day they remain in

custody is a tremendous hardship on those family members. (Kilpatrick Declaration at 2) Neither petitioner is able to provide a surety for $1000.00 bond. It is exactly circumstances such as these for which section 3144 appears to be designed.

Continued detention of the material witnesses after the video deposition is not necessary because the videotaped deposition itself is admissible evidence at trial, United States v. Canan 48 F. 3d 954 (6th Cir. 1995) cert. denied 116 S. Ct. 716 (1996); United States v. Santos-Pinon 146 F 3d 734 (9th Cir. 1998).

Respectfully submitted,

DATED: July 2, 2008

/s/__________________________
JONATHAN DAVID FRANK
Attorney for Material Witness

California State Bar Number 89384
The Law Office of JONATHAN DAVID FRANK
160 Thorn Street Ste. 2
San Diego, CA 92103
Telephone: (858) 722-2100

Attorney for Material Witnesses

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HON. CATHY ANN BENCIVENGO

UNITED STATES OF AMERICA, Plaintiff, v. GASTELUM, Defendants.	Criminal No. 08CR2032JLS Magistrate No. 08MJ8526 **PROOF OF SERVICE**

I, the undersigned, say:

1) That I am over eighteen years of age, a resident of the County of San Diego, State of California, and not a party in the within action;

2) That my business address is: 160 Thorn Street Suite 2, San Diego, CA 92103.

3) That I served the MOTION FOR VIDEO DEPOSITION AND ACCOMPANYING PAPERS on all counsel involved in this matter, by causing them to be delivered a copy via the Court's email notification system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on July 2, 2008 at Poway, California.

/S/JONATHAN DAVID FRANK
JONATHAN DAVID FRANK

JONATHAN DAVID FRANK
160 Thorn Street Suite 2
San Diego, CA 92103
(858) 722-2100
State Bar Number 89384

Attorney for Material Witnesses

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Hon.

UNITED STATES OF AMERICA, Plaintiff, v. GASTELUM, Defendants.	)	Case No. 08CR2032JLS Mag. No. 08MJ8526 DECLARATION OF JORGE ORTIZ-GONZALEZ IN SUPPORT OF MOTION FOR VIDEO DEPOSITION OF MATERIAL WITNESS DATE: 7/17/08 TIME: 2:30 P.M. DEPT: BENCIVENGO

I, JORGE ORTIZ-GONZALEZ declare:

I am over the age of 21 and if called as a witness, I could competently testify to the matters declared herein. I have been in federal custody since June 5, 2008. I have been held as material witness in the above captioned case. I have been unable to locate a surety to post bond.

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Each day I spend in custody is a hardship to me and my family. I have a common law wife and three minor children ages 2, 6 and 7. I am their sole means of support. I have been supporting them as a construction worker in Mexico for the past 9 - 10 years. Each day I spend is custody is another day that I am unable to support my family.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge except as to those matters stated to be based upon information and belief and, as to those matters, I am informed and believe that they are true and correct. Executed this 06/27/08 in El Centro, California.

/s/ Jorge Ortiz G.